

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

ORIGINAL

77-4115

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERCONEX, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
AND THE UNITED STATES OF
AMERICA,

Respondents.

Docket No. 77-4115

BRIEF OF PETITIONER, INTERCONEX, INC.

SANDRA G. BEHRLE
Austrian, Lance & Stewart, P.C.

JOSIAH K. ADAMS, JR.

GEORGE F. GALLAND
ROBERT L. McGEORGE
DALE C. ANDREWS
Galland, Kharasch, Calkins & Shor

Attorneys for Interconex, Inc.

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BRIEF OF PETITIONER, INTERCONEX, INC.

I.

JURISDICTION

Petitioner, Interconex, Inc., seeks to have this Court overturn a final order of the Federal Maritime Commission (hereinafter referred to as "FMC or "the Commission"), dismissing its complaint in a case entitled Interconex, Inc. v. Sea-Land Service, Inc., et. al., Docket No. 75-24, 17 SRR 409 (April 1, 1977).^{1/} This court has jurisdiction to review the FMC decision pursuant to 5 U.S.C. §§ 704, 706.

^{1/} Cites to FMC decisions which have not been officially reported are to Pike & Fisher Shipping Regulation Reports.

II.

STATEMENT OF THE CASE

Federal administrative agencies were designed to play an important role in our country's system of justice by adjudicating the merits of disputes within their specialized fields of expertise. The broad question for the Court to decide in this case is whether the FMC will be required to continue to serve as an instrument of justice — adopting or adapting procedural rules to reach the merits of disputes before it — or as a barrier to justice — construing its procedural rules, and ultimately its duty, so as to avoid rendering decisions on the merits of legitimate disputes properly brought before it.

The principal parties to the commercial transaction giving rise to this complaint include: Colt Industries Operating Corp. (Colt), a shipper of goods and merchandise to the Republic of Korea; the Government of the Republic of Korea, the consignee of such goods and merchandise; Interconex, a nonvessel operating common carrier by water (NVOCC) responsible for the movement of Colt cargo;^{2/} and Sea-Land Service, Inc., United States Lines, Inc., and American Export Lines, Inc., the three underlying common carriers by water which Interconex engaged to transport

^{2/} An NVOCC acts as a carrier vis-a-vis his shipper, assuming common carrier responsibility for the movement of cargo between the points or ports listed on the relevant bill of lading, subject to the conditions, rates and charges listed in his tariff (filed with the FMC). He acts as a shipper vis-a-vis the underlying vessels operating common carrier by water who actually provides the ocean carriage.

Colt cargo from various U.S. ports to Pusan, Korea. Interconex handled approximately 379 of those Colt shipments from about July 28, 1972 to about February 5, 1975. See J. App. Nos. 1, 36.^{3/}

On June 5, 1975, Colt filed a complaint against Interconex, Sea-Land, United States Lines, and American Export Lines before the FMC (on its own behalf and as agent for the Government of the Republic of Korea) alleging that Interconex had misstated the cubic measurements and/or weights on many of the shipments in question, and thereby had received compensation in excess of that provided for in its NVOCC tariff — in violation of Section 18 of the Shipping Act of 1916 (hereinafter "the Act") (46 U.S.C. §817). That complainant initiated FMC Docket No. 75-19. Colt further alleged that the underlying ocean carriers (i.e., Sea-Land, United States Lines and American Export Lines) also received compensation in excess of that provided for in their respective tariffs in violation of the Act. The total overcharge was estimated at \$500,000. J. App. No. 1.

As soon as Colt filed its complaint, Interconex found itself in the middle of a swirling controversy. On one side, Colt claimed that Interconex had overstated the correct

2 / Continued:

See Maritime Service Corp. v. Acme Fast Freight, 13 SRR 1025, 1027 (1973).

3 / The Joint Appendix is referred to as "J. App." and Petitioner's Appendix is referred to as "P. App.".

measurements and/or weights of Colt's cargo, but all records in Interconex's possession at that time indicated that it had not overstated any cargo measurements or weights.⁴/ If Colt really had documents in its possession which indicated that actual cargo measurements and/or weights were less than those stated on Interconex's bills of lading, however, Interconex realized that it would have overpaid the underlying carriers on those same shipments since it declared the same cargo measurements and weights to the underlying carriers which Colt had declared to it.

If the dispute between Colt on one extreme, the underlying carriers on the other extreme, and Interconex in the middle, had been within the original jurisdiction of the federal court system, Interconex's course of action would have been clear. It would have filed a cross-claim against co-parties under Federal Rule of Civil Procedure (F.R.C.P.) 13(g); the federal courts have long recognized the dilemma of the "middle man" in such situations and have devised third party practice and alternative pleading rules to meet the demands of justice.

⁴ / Ocean freight charges are calculated on the basis of the cubic measurements and weights listed on the carrier's bill of lading. All bills of lading issued by Interconex to Colt showed cargo measurements and/or weights equal to or less than the figures declared by Colt.

The FMC Rules of Practice and Procedure (46 CFR §502 et seq.), however, contain no such provisions. Apparently, the FMC never had occasion to reflect upon the procedural dilemma faced by the "middle man" in such situations.

The only FMC decision of which Interconex is aware bearing even slightly on the issue is United States Borax & Chemical Corp. v. Pacific Coast European Conference, 11 FMC 451 (1968). In that case, a shipper filed a complaint on November 21, 1966, alleging that it had been overcharged approximately \$90,000 when member lines of a steamship conference assessed it non-contract rates, instead of the applicable contract rates.^{5/} The conference answered that it was not party to a valid dual-rate contract with the shipper.

In a complaint filed on April 10, 1967 (characterized as a cross-complaint by the FMC), the conference claimed that, if there were a dual-rate contract in effect, the shipper breached it by shipping some of its cargo on a chartered vessel, and demanded payment in the approximate amount of \$18,000. That complaint, of course, was contingent upon the shipper prevailing in the initial proceeding; if the conference were to prevail in the initial proceeding

^{5/} Many steamship conferences publish a dual-rate system in their tariffs. Shippers agreeing to ship all of their cargo moving in the trade route covered by the conference via members of the conference are entitled to a special contract rate, usually 15% lower than the otherwise applicable non-contract rate. See Section 14(b) of the Act, 46 U.S.C. §813(a).

and establish that there were no valid dual-rate contract in force, it would have no cause of action against the shipper for shipping cargo via a chartered vessel.

The FMC found in favor of the shipper in the initial docket. Turning to the cross-complaint, the FMC dismissed on the grounds that:

(a) Since the complaint was not filed until two and a half years after the charter voyage had taken place, the claim was barred by the statute of limitations in Section 22 of the Act (46 USC §821). Id. at 471.

(b) The shipper did not obtain the lower contract rates by any "unjust or unfair device or means within the purview of the statute." Id.

By way of its rules and its discussion in the United States Borax case, the FMC erected three signposts to guide Interconex through what turned out to be a procedural minefield. First, Interconex could not simply await the outcome of FMC Docket No. 75-19, and file suit against the underlying carriers for a return of overcharges if and when Colt prevailed against it; the two-year statute of limitations was ticking away. For every few days that Interconex delayed filing suit against the underlying carriers, it would lose the right to recover on a shipment (at least with respect to Interconex's remedies before the FMC).^{6/}

^{6/} The running of the statute of limitations did not benefit all underlying carriers equally. Attachment A to J. App. 1 shows that the vast majority of all Sea-Land shipments did not occur until January of 1974 — within 18 months of the filing of Interconex's complaint in FMC Docket No. 75-24, while other carriers' shipments occurred as much as 34 months before the filing of that complaint.

Second, in the absence of third party practice rules, Interconex would have to initiate a separate proceeding to press its claims against the underlying carriers. Finally, the FMC appeared to be amenable to the concept of contingent complaints or alternative pleading when such pleadings were dictated by the circumstances.^{7/}

That third signpost was the least reliable, but Interconex was in a position that left it no other choice but to file a contingent complaint. First, at that time Interconex had no way of knowing whether the cargo measurements and/or weights used to calculate its freight charges to Colt, and to calculate the underlying carriers freight charges to it on corresponding shipments, were overstated. Only Colt had the necessary supporting documents showing actual measurements and/or weights. Thus, Interconex simply was not in a position to swear unconditionally that it had been overcharged by the underlying carriers. Second, without express alternative pleading authority in the FMC's procedural regulations,

^{7/} Although the contingency issue in United States Borax admittedly would have become moot after the FMC's finding that the conference's claim was barred by the statute of limitations, the FMC did volunteer its view on the merits of the conference's claim. If it had considered the conference's complaint to be invalid due to its contingent nature, it would have made more sense for the FMC to publish dicta on that subject of general public interest than to report on the merits of the dispute which could be of little interest to anyone other than the parties in that particular dispute.

virtually every time Interconex argued a position of fact or law to support its claim against the underlying carriers, Colt would have had the opportunity to use that statement against Interconex -- in effect to whipsaw it in FMC Docket No. 75-19.^{8/}

Taking all of these factors into consideration, Interconex initiated FMC Docket No. 75-24 on June 23, 1975 by filing a separate complaint against Sea-Land, United States Lines and American Export Lines,^{9/} in which it incorporated the Colt complaint in FMC Docket No. 75-19 by reference and alleged specifically that "if Interconex is finally required to pay reparation to Colt under or in consequence of the Colt complaint in Docket 75-19, the underlying carriers -- respondents herein -- will or may be required to indemnify Interconex for all or a part of such reparation." J. App. No. 4 at 3. Interconex also noted that the complaint was in the nature of a cross-claim against co-parties allowed under FRCP 13(g), hoping that this analogy would assist the FMC in understanding the intended purpose and effect of its complaint. Id.

^{20, 35}
^{8/} See J. App. Nos. ~~304~~ for Interconex's discussion of this issue in pleadings filed with the Commission.

^{9/} Interconex has since settled its claims for refund of United States Lines' freight overcharges on the shipments covered by FMC Docket No. 75-24 -- after filing suit in the Federal District Court for the Southern District of New York. ^{P. Ex. No. 1} J. App. No. 37. It settled its claims against American Export Lines without resort to litigation. Thus, the FMC Order of Dismissal affects the commercial interests of only Interconex and Sea-Land.

The Secretary of the FMC at first refused to accept the Interconex complaint, stating that it did not allege a violation of the Shipping Act, and the FMC had no rule similar to FRCP 13(g). J. App. No. 5. After receiving Interconex's letter in reply to this refusal (J. App. No. 6), the Secretary notified Interconex that upon reconsideration he would accept service of the complaint, noting that "enough doubt exists in regard to the question of whether incorporating a complaint of another constitutes a sufficient allegation of a violation of the Shipping Act that it should be allowed to be raised and determined in the proceeding." J. App. Nos. 7,8.

FMC Administrative Law Judge William Beasley Harris was assigned to hear both FMC Docket No. 75-19 and FMC Docket No. 75-24. After receiving motions to dismiss by all respondents in both proceedings, he issued what can only be characterized as an incredible string of orders.

On August 11, 1975, Judge Harris dismissed Interconex's complaint in FMC Docket No. 75-24, stating that Interconex had replied to none of the respondent-underlying carriers' motions to dismiss.¹⁰/ After reciting each of their motions, he relied upon the following analysis (quoted in full) to support the dismissal of the complaint:

¹⁰/ That was the second time Judge Harris overlooked a critical pleading by Interconex; one month before he apologized for his oversight in failing to take cognizance of Interconex's answer in FMC Docket No. 75-19.

"Upon review of the record herein, and in consideration of the above motions to which no objections have been filed, it is found and concluded that the above motions appear to be well-founded and should be granted." J. App. No. 17 at 3.

He then granted the motions to dismiss and discontinued the proceeding. It appears that the dismissal was without prejudice, as the order was silent on the subject.

In fact, Interconex's replies to those motions were filed by the deadline. Interconex filed a motion for reconsideration of his order on August 15, 1975. J. App. No. 18.

On that same day, Judge Harris filed an Order Upon Sua Sponte Reconsideration, dismissing the Interconex complaint. This time, he recited the Interconex replies and added the following analysis in affirming his previous order of dismissal:

"Upon review, consideration and reconsideration of the matters herein, it cannot be said that Interconex has supplied convincing arguments or data to support that the statutes and Rules of Practice and Procedure under which the Commission operates, permit sustaining of what Interconex admits is in the nature of a counter claim as as [sic] allowed in the United States District Courts under the Federal Rules of Civil Procedure. The Federal Maritime Commission is simply without authority so to proceed. Further, under the positions and arguments taken in the motions to dismiss, as opposed to those in the replies now considered, dismissal of the complaint seems warranted.

Wherefore, having previously considered the motions to dismiss, and now the replies thereto and having reconsidered the order served August 11, 1975, as well as the motions and replies, no facts, arguments or applicable laws or Rules of Practice

and Procedure have been presented that were not previously considered, and now having been considered and reconsidered warrant any changes or modifications in the order of August 11, 1975." J. App. No. 19 at 4, 5.

Again the dismissal appeared to be without prejudice.

Interconex filed its brief in support of its appeal of Judge Harris' dismissal on August 25, 1975. J. App. No. 20. In addition to defending the adequacy of its complaint, Interconex pointed out that the proper remedy to any procedural defects in the complaint would be the application of Rule 70 of the Commission's Rules of Practice and Procedure (46 CFR §502.70) providing for the amendment of defective complaints.

Judge Harris completely washed his hands of the Colt/Interconex/ underlying carrier dispute on September 5, 1975 by dismissing the Colt complaint in FMC Docket No. 75-19. This time his analysis was somewhat lengthier:

"Under a realistic appraisal of the pleadings filed herein, and the taking of official notice of Docket No. 75-24, this ostensible reparation proceeding fades from sight and a rather complex proceeding emerges patently not within the parameters of the statutory responsibility of this Commission, but those of a court with inherent equity jurisdiction, and exercising jurisdiction over all maritime contracts, torts, injuries or offenses. This Commission is without such jurisdiction. While jurisdiction in its proper sense means authority to hear and decide a cause, it is common to speak of jurisdiction in equity as not relating to the power of the agency to hear and determine a cause, but as to whether it ought to assume the jurisdiction and hear and decide the cause. J. App. No. 21 at 2, 3.

Interconex did not view Judge Harris' dismissal of Colt's complaint in FMC Docket No. 75-19 as a guarantee that its problems with Colt were over. Colt threatened to appeal Judge Harris' order to the Commission, and Interconex felt that the Commission would never uphold a decision avoiding its duty to hear the merits of Colt's claim.

Interconex and Colt then applied for a number of extensions of the deadline for appeal of Judge Harris' order, expressly notifying the FMC that such extensions were requested for the purpose of giving the parties time to conduct settlement negotiations. The FMC granted all of those requests. J. App. Nos. 22 - 30. ¹¹/ After reviewing Colt's records, Interconex became convinced that some of the cargo measurements indeed had been overstated. Moreover, its review of FMC decisions indicated that Colt would not be precluded from recovering overcharges on the ground that Colt, itself, supplied the overstated weights and/or measurements.¹²/ The best Interconex defense against the Colt claim appeared to be a tariff rule requiring that all claims

¹¹/ At no time did the FMC advise Interconex that the settlement of FMC Dkt. No. 75-19 might affect the validity of its complaint in FMC Docket No. 75-24.

¹²/ See, for example, Johnson and Johnson v. Prudential Grace, 14 SRR 187, 190 91 (Init. Dec. 1973), aff'd, 14 SRR 1465 (1975) and cases cited therein; Uniroyal International v. Farrell Lines, 16 FMC 409, (1973); Johnson and Johnson International v. Venezuelan Lines, 13 SRR 305, 310-11 (Init. Dec. 1972), aff'd, 16 FMC 84 (1973).

based upon mismeasurement had to be submitted to the carrier before the cargo left its position (the so-called Kraft rule). Interconex was aware, however, that the FMC decision upholding the Kraft rule — Kraft Foods v. Moore-McCormack Lines, Inc., 17 FMC 320 (1974) — was on appeal to the Court of Appeals, and believed that the Court probably would reverse. (In fact, the FMC decision was reversed in Kraft Foods v. FMC, 538 F.2d 445 [D.C. Cir. 1976]).

In view of those circumstances and the prospect of enormous legal expenses inherent in litigating the dispute, Interconex decided to make a substantial offer of settlement. Colt, the Republic of Korea, and Interconex reached agreement on a negotiated settlement in April of 1976. On April 28, 1976, the parties notified the FMC that they had not appealed the dismissal of Colt's claim and Interconex's counterclaim in FMC Docket No. 75-19 because that agreement had been reached, and forwarded a copy of the settlement agreement.

The underlying carriers had been invited to become party to an overall agreement in which they would settle Interconex's claims against them, as well as Interconex and Colt settling their claims against each other. Interconex and the underlying carriers were not able to reach agreement. See J. App. No.35 at 4,5 for a discussion of these matters.

On April 1, 1977 — more than nineteen months after Interconex's appeal — the FMC upheld Judge Harris' Order of Dismissal. It is that order which Interconex seeks to have this Court set aside.

III.

ARGUMENT

- A. Since The Interconex Complaint Properly Notified All Respondents of the Nature of Its Claim, The FMC's Dismissal Was Arbitrary, Capricious, An Abuse of Discretion and Contrary to the Administrative Procedure Act and Interconex's Rights of Due Process of Law

It is a familiar principle of administrative law that pleadings before federal agencies are to be liberally construed. As stated by Professor Davis, probably the foremost authority on administrative law:

"The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue. In the judicial system the long-term movement has been from the common-law system of pleading to formulate issues, to the early code ideal of stating all material facts, to the view now prevailing in the federal courts that fair notice is the objective. Of pleading in the courts, Profession [sic] Moore says in his treatise: 'The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved... A generalized summary of the case that affords fair notice is all that can be expected.'" Davis, Administrative Law Treatise §8.04, 523 (1958).

Citing Davis with favor, one court in reviewing the Interstate Commerce Commission's test of the adequacy of a complaint stated:

"[A] historic distinction exists between the degree of particularity required in judicial and agency pleading. Davis states that the evolution away from code pleading, in administrative law antedated the same phenomenon in civil law. Davis

[Administrative Law Treatise, at 523 (1958).]"
Akers Motor Lines, Inc. v. United States,
286 F. Supp. 213, 225, n. 12 (W.D.N.C.
1968).

As noted in another transportation regulatory agency case, Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841-42 (D.C. Cir. 1950):

"The whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalization of the common law."

See also NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 350-51 (1938); National Realty & Construction Co. v. Occupational Safety and Health Review Commission, 489 F.2d 1257, 1264 (D.C. Cir. 1973); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882, 885-86 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); L. G. Balfour Co. v. FTC, 442 F.2d 1, 19, 21-22 (7th Cir. 1971); Swift & Company v. United States, 393 F.2d 247, 252 (7th Cir. 1968). In the same vein, it has been recognized that the Administrative Procedure Act, 5 U.S.C. §500, et seq., is a "notice" statute "intended to protect persons who have no actual notice from in any manner being adversely affected." United States v. Floyd, 477 F.2d 217, 222 (10th Cir.), cert. denied, 414 U.S. 1044 (1973) (emphasis in original).

It is beyond question that Interconex's complaint in FMC Docket No. 75-24 notified the respondent-carriers of Interconex's claim that, if it owed Colt any freight refunds on the shipments covered by FMC Docket No. 75-19, those carriers owed freight refunds on those same shipments to

Interconex. No amount of formalistic obfuscation will ever change that fact. Indeed, neither the respondent-carriers in FMC Docket No. 75-24, nor the FMC itself, has ever claimed that the Interconex complaint failed to afford the underlying carriers at least a generalized summary of the case or provide fair notice of its claims against them.

Ignoring the only relevant question — whether Interconex's complaint in FMC Docket No. 75-24 provided the underlying carriers with proper notice — the Commission instead played word games by concentrating upon the conditional aspect of Interconex's complaint:

"The complaint of ICX [i.e., Interconex] in this proceeding being 'in the nature of a cross-claim' did not constitute a wholly independent cause of action but rather relied for its vitality upon the catalytic effect of a finding that ICX was liable to Colt Industries for assessing improper charges under the complaint filed in Docket No. 75-19. In the event of such a finding, then the claim of ICX, in theory at least, would come to life and any liability suffered by ICX would then ipso facto form the basis of ICX's complaint against the ocean carriers.

ICX itself in its appeal recognized the contingency of its claim when it advised that:

... ICX has no reason to make any unconditional claim against the underlying carriers unless it is held liable to Colt ... [emphasis original];

and, that:

Possibly the Colt case against ICX will be decided in a way which renders the ICX complaint moot — in which case the ICX complaint can be dismissed or withdrawn.

The contingency — i.e., a finding of ICX's liability in Docket No. 75-19 — failed, however when the claim of Colt against ICX was dismissed by the Presiding Officer and became the decision of the Commission. This dismissal of the underlying Colt complaint destroys the possibility of a finding of ICX liability in that proceeding which would give rise to any claim by ICX in this proceeding. Therefore, ICX has no claim as to which, under any set of circumstances, as framed, it would prevail." (emphasis in original). ~~Ex. 36 at 4, 5.~~ J. App. No. 36 at 4, 5.

The notice afforded those parties was no less sufficient because Interconex's claim against the underlying carriers was contingent upon a determination that the actual measurements and/or weights of Colt cargo, were less than the figures declared by Colt to Interconex (and subsequently re-declared by Interconex to the underlying carriers.) Moreover, the Interconex complaint did not state or imply that the determination that the actual cargo measurements and/or weights had been overstated had to be made by the FMC, or that Interconex's own determination of that fact would not satisfy the contingency proclaimed in the Interconex complaint. The contingency could fail only if Colt were to give Interconex an unconditional release from any liability on those shipments (without requiring anything from Interconex in return) or if Colt were to exhaust all remedies before the FMC and the courts without success. Since neither of those events occurred, the contingency did not fail.

If the fog of formalism had not obscured reality from the Commission's vision, it could have seen that the issue raised in the Interconex complaint was far from moot. An issue is moot when its outcome cannot have any practical legal effect on an existing controversy. See Blacks Law Dictionary (4th Ed.) at 1159. The Commission could have upheld Judge Harris' dismissal of the Colt/Interconex dispute on mootness grounds — since a settlement had been reached between those parties, a determination of the issues in that dispute would have had no legal effect. That dismissal afforded no basis for the subsequent dismissal of Interconex's suit against the underlying carriers on mootness grounds, however. The underlying carriers had been placed on notice of the general nature of Interconex's claim by its complaint, and nothing had occurred to reduce Interconex's rights against the carriers to a nullity. To hold that mootness spread by infestation from FMC Docket No. 75-19 to FMC Docket No. 75-24 ignores the reality of the concept, and is further indicative of the Commission's exaltation of form over substance in dismissing the Interconex complaint.

Moreover, when the Commission's order of dismissal addresses the possibility of Interconex's contingency — a finding of Interconex's liability in FMC Docket No. 75-19 — having failed by virtue of the unappealed dismissal of that proceeding, it attempts retreat into the bygone days of formalistic interpretation of the adequacy of complaints. It is too

late in the day for the Commission to find comfort in formalism. If it believes that the intervening settlement of FMC Docket No. 75-19 somehow destroys the validity of Interconex's complaint, the Commission must take the novel, but unrealistic, position that the underlying carriers had notice that Interconex would press its claim for freight refunds only in the event that Interconex were found liable to Colt in FMC Docket No. 75-19, and not in the event that Interconex refunded freight charges to Colt under the terms of a settlement agreement to avoid what Interconex believed would be a successful appeal of FMC Docket No. 75-19. The Commission has not yet made this claim.

The Commission's actions are especially capricious in view of its realization that the question raised by Interconex's contingent complaint was procedurally unique. ¹³/ Its dismissal of that complaint with prejudice and without reaching the merits of Interconex's contentions reveals a philosophy of administrative practice which is the obverse of the requirements of modern administrative theory. Such philosophy has been condemned as a matter of law when advanced by sister agencies. For example, when faced with an agency dismissal of a third party complaint on formalistic notice grounds, one United States District Court has warned:

¹³/ See the letter of the FMC Secretary accepting the filing of the Interconex complaint. J. App. No. 7.

"The position of the [Interstate Commerce] Commission in regard to adequacy of notice seems to embody a concept of particularity in pleading equivalent to the rigid formalisms of common law pleading. It is not disputed that [the affected party] had notice of the conduct complained of ... Nor is it disputed that the investigation proceeding was instituted under statutes which variously gave the Commission the power [to resolve the issues]... A theory of pleading 'based on common law thinking has no place in administrative proceedings.' Sisia v. Flemming, 183 F. Supp. 194, 201 (E.D.N.Y. 1960)." Akers Motor Lines, Inc. v. United States, 286 F. Supp. 213, 225, n. 12 (W.D.N.C. 1968).

The court in Akers went on to hold that an administrative dismissal that would require a party to "turn around and file a complaint under exactly the same statutes and allege illegality which arises out of exactly the same facts... is administratively intolerable." (emphasis in original). Id. at 225]. Such a result is even more intolerable in the instant case since recovery on a refiled complaint would have been barred by the statute of limitations.

The Court of Claims has warned that:

"Especially if the merits of the determination may be largely shielded from judicial review (as the Government urges is true here) is it essential that proper procedures precede the administrative decision. In those situations the right to fair process may be the most meaningful right possessed

by the affected parties, and at the same time the sharpest goad pressing the decision-maker toward a fair and correct result."
Moore-McCormack Lines, Inc. v. United States,
413 F.2d 568, 581 (Ct. Cl. 1969).

The best demonstration of the principle that contingent complaints do not disappear when the initial complaint is withdrawn, dismissed or settled is the analogous federal third party practice rules. Although the mention of federal practice rules in this case seemed foreign to the Commission, Section 27(a) of the Act (46 USC §826,a)) requires that they be followed by the FMC to the extent practicable. If the Commission had followed the dictate of Section 27, it would have discovered that:

"[Rule 13(g)] does not require that a previously interposed cross-claim be dismissed when, subsequent to the cross-claim, the original claim itself is dismissed or the plaintiff's claim against the co-party is dismissed." (citations omitted). Barker v. Louisiana & Arkansas Railway Co., 57 F.R.D. 489, 491 (W.D. La. 1972).

If the federal courts believed that the notice-giving effect of such third-party complaints disappeared upon the dismissal of the original complaint, they could never reach the result quoted above. This analogy is especially significant when it is remembered that administrative agencies' pleading rules are supposed to be more liberal than those of the federal courts.

Another analogous event occurred in a case involving a suit by a subcontractor against a prime contractor, the prime contractor's surety and various other co-defendants.

The prime contractor's surety was dismissed from the original action on the ground that he was liable only to the prime contractor, and not to any of the subcontractors. The surety's argument that the prime contractor's cross-claim against him also should be dismissed, because he was no longer a co-party, was less successful. The court concluded:

[The argument in favor of dismissal] is perhaps novel, but not difficult. The aim of procedural rules is facilitation not frustration of decisions on the merits." Frommeyer v. L & R Construction Co., 139 F. Supp. 579, 585 (D.N.J. 1956).

The court sensibly held that the contingent complaint was valid when filed, and did not lose its validity upon the intervening dismissal of the surety as a co-defendant.

Assuming for the moment that Interconex did not rely upon the proper legal theory for collecting freight refunds from the underlying ocean carriers, the FMC still abused its discretion in dismissing the complaint (See United States v. Thompson, 293 F. Supp. 1307, 1310 [E.D. Ark. 1967], aff'd., 408 F.2d 1075 [5th Cir. 1969]); if during the course of the hearing (that did not occur) the Judge had found that the underlying carriers did base their freight to Interconex on overstated cargo measurements, elementary principles of justice would have demanded that he apply the proper legal principle to order appropriate refunds.

Finally, even if this Court were to determine that the Commission normally is entitled to dismiss complaints on the basis of their form instead of the substance of their

notice-giving effect, it should still set aside the decision in this case. A ruling that the Interconex complaint became a nullity¹⁴/ when it settled FMC Docket No. 75-19 would fly in the face of the long established doctrine favoring the voluntary settlement of disputes.¹⁵/ If the Commission's decision is upheld, it will mean that Interconex was foolish to settle its dispute with Colt when it became convinced that a number of shipments had been assessed freight charges on the basis of overstated cargo measurements. Such a holding would dictate that, instead of making a reasonable settlement with Colt, Interconex should have subjected Colt to additional

¹⁴/ It is important to remember that the FMC assumed that the complaint was valid when filed, but lost its validity when the contingency could no longer occur. The contingency did not occur by virtue of a decision in FMC Docket No. 75-19; it did occur by virtue of Interconex's settlement of that dispute to forestall an appeal of Judge Harris' dismissal in FMC Docket No. 75-19.

¹⁵/ See Consolidated International Corp. v. Concordia Line, 14 SRR 1259 (Initial Decision 1975); Levatino & Sons, Inc. v. Prudential-Grace Lines, Inc. 13 SRR 1079, 1101 (Initial Decision, 1973); Stauffer Chemical Co. v. Azta Lines, 13 SRR 375 (Admin. L. Judge, 1972). See also Du Puy v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 519 F.2d 536 (7th Cir. 1975), cert. denied, 424 U.S. 965 (1976); Newman v. Stein, 464 F.2d 689, 691-92 (2nd Cir.) cert. denied, 409 U.S. 1039 (1972).

legal expense by defending against meritorious Colt claims to the bitter end.^{16/} In Interconex's opinion, the doctrine favoring voluntary settlement of disputes is too important to sacrifice to the FMC's adherence to formalistic testing of the adequacy of complaints.

B. At Virtually Every Stage of the FMC's Adjudicatory System, Interconex's Right to a Fair Hearing on its Claim Was Ignored in Violation of the Administrative Procedure Act and Interconex's Constitutional Right to Due Process of Law

1. FMC Procedural Regulations Are Not Exempt From the Requirements of the Administrative Procedure Act or Constitutional Due Process Standards

One of the primary functions of the FMC is to adjudicate disputes of a maritime nature between adversaries subject to its jurisdiction. Accordingly, it is "obligated to provide a consistent structure that [does] not frustrate basic notions of fairness, impartiality and informed and rational decision making." Koniag, Inc. v. Kleppe, 405 F. Supp. 1360, 1371 (D.D.C. 1975).

Although the scope of judicial review of agency decisions is somewhat limited,^{17/} "[a]n administrative order must

^{16/} This is not to say that Interconex acknowledged any part of Colt's claim other than the fact that it was entitled to a freight refund on certain shipments despite its misdeclaration of cargo measurements and/or weights to Interconex. In fact, that is the extent of Interconex's acknowledgment of Colt's claim in FMC Docket No. 75-19.

^{17/} The scope of judicial review under the Administrative Procedure Act is defined at 5 U.S.C. §706:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

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be set aside... if the agency's underlying standards are not in accord with law " (Wheatley v. Adler, 407 F.2d 307, 310 [D.C. Cir. 1968]; see also Kovac v. Immigration and Naturalization Service, 407 F.2d 102, 104 [9th Cir. 1969]) or "the demands of the Constitution." FCC v. Schreiber, 381 U.S. 279, 291 (1965). See also FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143-44 (1940); Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 276 (1933).

17 / Continued:

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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2. The FMC Violated Its Own Procedural Regulations When It Dismissed Interconex's Complaint

As stated previously, the relevant test of the adequacy of a complaint filed before any administrative agency is whether the complaint provides fair notice of the general nature of the claim. The rules and regulations of the FMC concerning dismissal of complaints (properly construed) are no different from those of any other federal agency. As stated by FMC Administrative Law Judge Marshall:

"... it is well established that a complaint may be dismissed on motion only if clearly without any merit. Dismissal for such insufficiency may not be granted 'unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of a claim.' 2 Moore's Federal Practice (2d Ed.) ¶12.08." Investigation of General Rate Increase in the Domestic Guam Trade v. PFEL, Inc., 7 SRR 167 (Init. Dec. 1966).

FMC Administrative Law Judge Greer stated a similar view on agency pleading:

"[D]ecisions on the merits are not to be avoided on the basis of more technicalities; ... pleading is not a game of skill in which one misstep by counsel may be decisive of the outcome." Chr. Salverson & Co. v. West Michigan Dock & Market Corp., 9 SRR 1154, 1156 (Init. Dec. 1968).

17 / Continued:

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." (emphasis added).

In the instant case, Interconex employed existing FMC procedural regulations and filed a separate complaint against the underlying carriers to accomplish the same result as could be accomplished by a defendant in the federal court system filing a cross-claim against co-defendants. The Commission recognized that its procedural rules did not permit the adjudication of the Colt dispute with Interconex and the Interconex dispute with the underlying carriers in one proceeding (a point of seeming importance to Judge Harris and the Commission, but never in dispute). It misapplied its own regulations, however, when it held that, if two disputes cannot be tried in one proceeding, they cannot be tried in two proceedings.

3. The FMC Is Under a Duty to Adopt Procedural Regulations That Will Allow Interconex To Have Its Claim Adjudicated

Interconex admits that this was probably the first time that the FMC was faced with third party practice problems, but submits that the FMC's previous non-recognition of the problem is no excuse for it to avoid its duty to adjudicate the dispute. Where previously unenvisioned procedural problems occur in the course of an administrative proceeding, the agency shirks its duty if it sidesteps the problems formalistically. Such problems "must be solved despite the absence of a relevant general rule." Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 202 (1947). See Hill v. FPC, 335 F.2d 355, 365 (5th Cir. 1964); United States v.

Clinton, 310 F. Supp. 333, 336 (E.D. La. 1970). "[I]t is too late for an Agency to declare the standards to be met by its decision holding that they have not been met." Hill v. FPC, 335 F.2d 355, 356 (5th Cir. 1964); See Foman v. Davis, 371 U.S. 178, 181-82 (1962).

More than thirty years ago, the Supreme Court advised a predecessor maritime regulatory agency at "as the expert body established by Congress for safeguarding this specialized aspect of the national interest" upon finding a wrong which it is duty-bound to remedy, it should, "within the general framework of the Shipping Act, fashion the tools for so doing." California v. United States, 320 U.S. 577, 584-85 (1944).

In this situation, it appears that the FMC decided against fashioning procedural rules which would allow Interconex to press its claim against the underlying carriers because it would have been inconvenient to do so.¹⁸ / That is no excuse; "constitutional principles may not be violated for administrative expediency ..." Maryland v. EPA, 530 F.2d 215, 227 (4th Cir. 1975), vacated on other grounds, ____ U.S. ____, 97 S. Ct. 1635 (1977).

¹⁸ / This appears to be the same reasoning for the Secretary's initial rejection of Interconex's complaint, the Administrative Law Judge's dismissal of FMC Docket Nos. 75-19 and 75-24, and the Commission's nineteen month delay in issuing its order upholding the Initial Decision.

4. The Administrative Law Judge's Initial Decisions Did Not Provide the Necessary Statement of Facts Or Legal Reasoning to Form the Basis for Any FMC Decision

Judge Harris' first decision was based upon his mistaken impression that Interconex had not opposed the underlying carriers' motions to dismiss. Within three days of being notified that Interconex in fact had filed replies to the underlying carriers, the Judge reconsidered his order "sua sponte" and adhered to his original decision. All arguments in the Interconex replies were rejected without the benefit of analysis, citation or authority or specification of any legal or factual deficiency. In the section labeled (or, more realistically, mislabeled) "Discussion", the order merely states that the relevant statutes and rules (not identified) do not "permit sustaining of what Interconex admits is in the nature of a counter claim", and (b) "dismissal of the complaint seems warranted" (for reasons not stated). J. App. No. 19 at 4. On item (a) the Judge was simply wrong. Interconex noted that its complaint was in the nature of a cross-claim against co-parties, not a counter claim. As for item (b) — that dismissal "seems warranted" — the Judge could have stated, with equal persuasiveness and equal insight into his legal reasoning, that dismissal "seems unwarranted." Regardless of which way the Judge decided the case, the Commission had no logical basis for review,

as required by the Administrative Procedure Act.^{19/} The Commission then, abused its discretion by not remanding the Initial Decision to the Administrative Law Judge for a proper explanation of his rulings.

5. The FMC Foreclosed Interconex's Right to State Its Views on Important Issues By Considering Issues Not Raised by the Administrative Law Judge

One of the inevitable results of Judge Harris' non-discussion of the reasons behind his dismissal of Interconex's claim in FMC Docket No. 75-24 was the Commission's consideration of issues not raised by his order. For example, Judge Harris seemed to have dismissed the Interconex complaints without prejudice. At least that is the logical inference from his silence on the subject. Since the Judge never broached the subject of dismissal with prejudice, Interconex had no fair warning that the issue was in dispute, and did not argue to the Commission that if it dismissed its complaint, it should do so without prejudice.

Adopting Judge Harris' practice of determining important issues without stating the rationale, the Commission dismissed Interconex's complaint with prejudice and without explanation.^{20/}

^{19/} "All decisions, including initial, recommended, and tentative decisions... shall include a statement of findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law or discretion presented on the record 5 U.S.C. §557(c) (emphasis added.)

^{20/} The Commission's aversion to stating its reasoning for dismissing the Interconex complaint with prejudice violates the Administrative Procedure Act (5 U.S.C. §557(c)).

Not only did Interconex lose the right to state its views on the subject by the Commission's action — the Commission was also wrong. A complainant cannot be precluded from redrafting his complaint to correct technical pleading deficiencies, especially when, as in the instant case, the procedural requirements are themselves unclear. Dismissal in any form is a drastic remedy, and is to be granted only in extreme circumstances (Dyotherm Corp. v. Turbo Machine Co., 392 F.2d 146 [3d Cir. 1968]; G.F.I. Computer Industries, Inc. v. Fry, 476 F.2d 1 [5th Cir. 1973]; In re C. S. Crawford & Co., 423 F.2d 1322 [9th Cir. 1970]) especially if sought on grounds not reaching the merits of the dispute. Fidelity & Casualty Co. of New York v. Life Companies, Inc., 36 F.R.D. 267 [S.D.N.Y. 1964]; Vogelstein v. National Screen Service Corp., 204 F. Supp. 591 (E.D. Pa. 1962), aff'd 310 F.2d 738 [3rd Cir. 1962], cert denied, 374 U.S. 840 [1963]). That doctrine applies with even greater force when dismissal is with prejudice. Independent Productions Corp. v. Loews, Inc., 283 F.2d 730 (2d Cir. 1960).

Although the two-year statute of limitations embodied in Section 22 of the Act now precludes the refileing of a complaint before the FMC with respect to any of the shipments covered by FMC Docket No. 75-24, dismissal with prejudice is not a moot point. It may affect Interconex's rights to press its claim against the underlying carriers in the courts. 21 /

21 / Sea-Land has filed suit against Interconex in the Federal District Court for the Southern District of New York, alleging that Interconex owes it approximately \$32,000
(continued next page)

6. The FMC Unreasonably Delayed Issuing A
Decision in FMC Docket No. 75-24

Interconex's appeal of Judge Harris's dismissal was filed on August 25, 1975. On April 1, 1977, more than nineteen months later, and some two months after the last shipment in FMC Docket No. 75-24 slipped beyond the two-year statute of limitations, the Commission finally issued its decision.

The great bulk of all Sea-Land shipments began in January of 1974, and continued at a fairly steady pace through February of 1975. J. App. No. 1, Appendix A. Thus, if the Commission had issued the exact order which Interconex now contests within a reasonable period, Interconex would have had time to: (a) file a petition for reconsideration with the Commission on the very narrow point that the complaint should not have been dismissed with prejudice; and (b) if successful, refile a complaint against Sea-Land with respect to all or a substantial portion of the shipments carried by it, before the statute of limitations ran out. In fact, Interconex might even have had time to file a petition for review with the Court of Appeals, requiring only that minor victory to reassert its claim against Sea-Land. When the

21 / Continued:

for freight charges on certain shipments covered by the shipments in FMC Docket No. 75-24. Interconex, in fact, has withheld such amounts in the belief that: (a) Sea-Land owes it more than that amount as a result of having overcharged it on a number of shipments included within the same basic transaction, and (b) that even that \$32,000 amount is overstated due to Sea-Land's computation of freight bills from the basis of overstated cargo measurements and/or weights. Sea-Land may take the position that Interconex is precluded from challenging the amounts of those freight bills due to the fact that Interconex's complaint in FMC Docket No. 75-24 was dismissed with prejudice. While Interconex would

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Commission unreasonably delayed issuing its decision, Interconex lost the opportunity to make good on its claim against Sea-Land by proving only that any dismissal should have been without prejudice.

The Commission succeeded in proving the point noted in Environmental Defense Fund v. Hardin, 423 F.2d 1093, 1099 (D.C. Cir. 1970) that agency inaction can be just as devastating as agency action. Considering the circumstances of this case, it must be concluded that the Commission failed to conclude this matter within a reasonable time, in violation of the Administrative Procedure Act (46 U.S.C. §555[b]).

7. The FMC Adjudicatory System, As A Whole,
Failed to Meet the Fairness Standards of
the Administrative Procedure Act and the
Constitutional Guarantee of Due Process
of Law

A summary of the FMC's treatment of Interconex's claim against the respondent-underlying carriers in FMC Docket No. 75-24 shows: (1) the FMC Secretary's initial refusal to accept the complaint; (2) the FMC Administrative Law Judge's grant of motions to dismiss the complaint without bothering to find out whether Interconex opposed such dismissal; (3) the FMC Administrative Law Judge's second grant of those motions following the instantaneous sua sponte reconsideration, providing no hint as to the reasons for the dismissal; (4) the Commission's retreat to outdated and discredited standards

21 / Continued:

contest such an argument, a dismissal without prejudice would have avoided the issue.

of formalism in finding the Interconex complaint defective, without once considering whether the underlying carriers had received notice of the nature of Interconex's claim; (5) the Commission's long delay in rendering its decision, which insured that the statute of limitations had run on all shipments by the time the decision was issued; and (6) the Commission's consideration of issues for which Interconex had no opportunity to present its views.

As noted previously, the FMC is "obligated to provide a consistent structure that [does] not frustrate basic notions of fairness, impartiality and informed and rational decision making." Koniag, Inc. v. Kleppe, 405 F. Supp. 1360, 1371 (D.D.C. 1975). Its procedural structure must be judged under both the Administrative Procedure Act and "the more flexible due process concepts of fundamental fairness and a meaningful opportunity to be heard..." Id. Short-circuiting the administrative process by formalistic and unreasonable application of procedural rules is "not the kind of agency action that promote[s] the kind of interchange and refinement of views that is the lifeblood of a sound administrative process." See National Organization for Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654, 659 (D.C. Cir. 1974). Reluctantly, it must be concluded that the FMC persistently and consistently refused to consider the merits of Interconex's claim in clear disregard of its duty under the Administrative Procedure Act and the Constitution.

C. The FMC Abused Its Discretion By Denying Interconex the Right To Amend Its Complaint

On two occasions, Interconex pointed out that if its complaint was defective in any manner, the proper response would have been to require its amendment, not to dismiss it. See J App. Nos. 20 & 35. The appropriate procedural rule, FMC Rule 70 (46 CFR §502.70), provides that:

"[T]he Presiding Officer may direct a party to state his case more fully and in more detail by way of amendment." 22 /

It is a corollary to the liberal approach to the construction of administrative pleadings that those pleadings are also to be "very easily amended." National Realty & Construction Co. v. Occupational Safety and Health Review Commission, 489 F.2d 1257, 1264 (D.C. Cir. 1973); see also NLRB v. Fant Milling Co. 360 U.S. 301 (1959); Curtiss-Wright Corp., Wright Aero. Div. v. NLRB, 347 F.2d 61, 73 (3d Cir. 1965). This approach has been recognized to be applicable specifically to the filing of amendments in FMC proceedings. Chr. Salvesen & Co., Ltd. v. West Michigan Dock & Market Corp., 9 SRR 1154, 1156.

22 / This rule corresponds to Rule 15(a) of the Federal Rules of Civil Procedure providing that, after any responsive pleadings are filed or a party has once amended his pleadings, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (Emphasis supplied.)

The differences between the two rules are not especially significant. First, the Commission's rule explicitly allows the presiding officer to take the initiative in having pleadings amended, while the Federal Rules reserve the initiative to the litigants. Second, the Federal Rules explicitly require a judge to grant leave to amend when justice so requires. The obligation of FMC Administrative Law Judges to conduct proceedings within the dictates of justice is, of course, no less than that imposed upon federal judges.

In Foman v. Davis, 371 U.S. 178, 181-82 (1962), the Supreme Court forcefully affirmed the concept that leave to amend pleadings should be freely given, and just as forcefully rejected the concept that decisions on the merits may be avoided on the basis of technical pleading rules. The First Circuit ruled accordingly in Ballou v. General Electric Co., 393 F.2d 398 (1st Cir. 1968), cert. denied, 401 U.S. 1009 (1971):

"In any event, it would have been necessary to give plaintiffs an opportunity to amend if this were merely a matter of deficient pleadings." Id. at 399.

The Commission should be no less anxious to require just and fair determination of disputes.

The effect of the Commission's refusal to allow Interconex to amend its complaint and its subsequent dismissal of the complaint was to deprive Interconex of its constitutionally guaranteed hearing on the underlying issues and the attendant "opportunity... to try to make [its] views prevail." Automotive Parts and Accessories Association v. Boyd, 407 F.2d 330, 343 (D.C. Cir. 1968); see Hudson River Fishermen's Association v. FPC, 498 F.2d 827, 834 (2d Cir. 1974; cf. American Public Power Association v. FPC, 522 F.2d 142, 145-46 (D.C. Cir. 1975).

In reality, the issue of whether the FMC procedural rules can accommodate a contingent complaint and whether such a complaint disappears upon the dismissal of the original complaint forming the basis of contingency — an issue which

so captivated the attention of the Commission that it lost sight of the notice-giving effect of the Interconex complaint — need not be decided. Interconex now knows that certain cargo measurements used to calculate its freight charges to Colt, and used by Sea-Land to calculate its freight charges to Interconex on corresponding shipments, were overstated. Given leave to amend its complaint, it now can (and will) file an ordinary, traditional and unconditional claim against Sea-Land before the FMC. It has most, if not all, of the relevant facts and figures in its possession and can file such an amendment to its complaint within thirty days of its receipt of this Court's decision.

IV.

CONCLUSION

For the reasons stated herein, Petitioner, Interconex, requests this Court to set aside the decision of the Federal Maritime Commission in Interconex, Inc. v. Sea-Land Service et al., and to remand this case to the Commission with instructions to hear the merits of its claims against Sea-Land.

Respectfully submitted,

SANDRA G. BEHRLE
Austrian, Lance & Stewart, P.C.
630 Fifth Avenue
New York, New York 10020

JOSIAH K. ADAMS, JR.
630 Fifth Avenue
New York, New York 10020

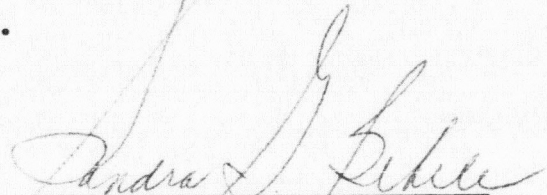
GEORGE F. GALLAND
ROBERT L. McGEORGE
DALE C. ANDREWS
Galland, Kharasch, Calkins & Short
1054 Thirty-first Street, N. W.
Washington, D. C. 20007

Attorneys for Interconex, Inc.

October 7, 1977

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of
Petitioner, Interconex, Inc., was served upon each of
the parties of record by first class mail, postage prepaid,
this 7th day of October, 1977.



Sandra G. Behrle

